In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

WELLS FARGO BANK & UNION TRUST CO.,
Petitioner and Appellant below,
vs.
COLLECTOR OF INTERNAL REVENUE,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the Supreme Court of the Philippines appears in the records of that Court under General Registry No. 46720 (Record, pages 128 to 138). The official report has not yet been printed.

The opinion of the Court of First Instance of Manila is set forth in the Record at pages 121 to 127.

II.

JURISDICTION.

1. The date of the decision to be reviewed is June 28, 1939 (Record, pages 128 to 138); a motion for reconsideration was made on July 12, 1940 (Record, page 138); the motion was denied on August 6, 1940 (Record, page 146); judgment was entered and became final on August 10, 1940 (Record, page 153).

2. The statutory provision which sustains the jurisdiction of this Court is section 7 of Chapter 229, Act of February 13, 1925 (43 Statutes, 940; U. S. C. A., Title 28, section 349). The petition for writ of certiorari is made in conformance with Rule 42 of the Rules of this Court. It is within the six months time limit permitted by section 7 of Chapter 229, Act of February 13, 1925. According to the decisions of this Court, the time for the filing of this petition commenced with the date of entry of judgment denying rehearing, August 10, 1940 (Record, page 153).

> *National Labor Relations Board v. Mackay Radio & Telegraph Co.,* 304 U. S. 333, 82 L. ed. 1381, at 1389.

3. The case is brought to this Court because it involves the Constitution and a statute of the United States, namely, the Philippine Autonomy Act of Congress of 1916, Chapter 416, section 3 (39 Statutes, 545; U. S. C. A. Title 48, section 1008), which adopts the principles of the Fourteenth Amendment of the Federal Constitution. The involvement of the Constitution and statute arises (a) from the construction by the Philippine Supreme Court that section 1536 of the

Administrative Code imposes a succession tax on the transfer upon death of shares in an anonymous partnership of the Philippines owned by a nonresident, nondomiciled decedent; and (b) the determination that such statute is valid and does not violate the aforementioned constitutional and statutory provisions. The Supreme Court of the Philippines has, therefore, determined a federal question of substance. Whether a statute as construed and enforced by the Courts of the Islands violates the due process provisions of the Federal Constitution incorporated in the organic laws of the Philippines is a question which has commanded the attention of this Court on numerous occasions.

III.

STATEMENT OF THE CASE.

A statement of the case has already been set forth in the preceding Petition for Certiorari, paragraph I thereof, pages 1 to 3, and such statement is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of the Philippines erred in construing section 1536 of the Administrative Code of the Philippines to apply to the transfer upon death of shares of an anonymous partnership of the Philippines owned by the decedent, Birdie Lillian Eye, who

was a resident of and domiciled in the State of California.

2. The Supreme Court of the Philippines erred in holding that section 1536 of the Administrative Code of the Philippines, as construed to apply to the transfer upon death of shares in a Philippine anonymous partnership of the decedent, Birdie Lillian Eye, a resident of and domiciled in the State of California, was valid and did not violate the provisions of the Fourteenth Amendment adopted by the organic laws of the Philippine Islands.

3. The Supreme Court of the Philippines erred in holding that the shares of stock in the anonymous partnership which belonged to decedent at the time of her death had an actual situs in the Philippines sufficient to sustain the jurisdiction of the Philippines to levy a tax upon the transfer of said shares by her will.

V.

SUMMARY OF THE ARGUMENT.

It is the position of the petitioner herein:

(1) That the Supreme Court of the Philippines unreasonably and improperly construed section 1536 of the Administrative Code of the Philippines as imposing a tax upon the transfer of shares in a Philippine anonymous partnership passing by the will of the decedent, who was neither a resident of nor domiciled in the Philippines, and whose will and estate were probated in the State of California. In reaching this

conclusion, the Court violated three generally accepted rules of construction:

(a) That when a statute admits of two interpretations, one of which presents a grave question of constitutionality and the other brings it within constitutional limits or avoids the question thereof, the Court should adopt the latter interpretation;

(b) That a taxing statute be not assumed to operate extraterritorially; and

(c) That if a statute be subsequently amended, the presumption is that the amendment was intended to change the statute and that the content of the amendment was not contained in the original law.

(2) That section 1536 of the Administrative Code violates the principles of the Fourteenth Amendment, adopted as aforementioned as the law of the Philippines, in its attempt to tax the transfer upon death of shares in a Philippine anonymous partnership of a decedent who resided and was domiciled in a State of the United States.

(a) This question heretofore has not been precisely determined, as the cases relating to this general subject have involved either the taxing authority of the several states,

First National Bank of Boston v. Maine, 284 U. S. 312, 76 L. ed. 313;

Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 74 L. ed. 371;

Baldwin v. Missouri, 281 U. S. 586, 74 L. ed. 1056;

Beidler v. South Carolina Tax Commission, 282 U. S. 1, 75 L. ed. 131;

or the taxing power of the federal government,

Burnet v. Brooks, 288 U. S. 378, 77 L. ed. 544.

(b) The cases relating to the power to tax as between the several states should, by analogy and authority, control as between the Philippine Islands and a State of the United States.

Compania General De Tabacos De Filipinas v. Collector of Internal Revenue, 275 U. S. 87, 72 L. ed. 177.

(3) That the facts of the instant matter do not warrant the application of a different rule than that set forth in *First National Bank of Boston v. Maine.* If that case is still law it should control as its facts are practically identical to those herein. The presence of the stock certificates in the Philippine Islands is not sufficient to create a legal basis for taxation. This case does not, therefore, fall within the doctrine of *Curry v. McCanless,* 307 U. S. 357, 83 L. ed. 1339.

VI.

ARGUMENT.

1. **THE SUPREME COURT OF THE PHILIPPINES ERRED IN CONSTRUING SECTION 1536 OF THE ADMINISTRATIVE CODE AS IMPOSING A TAX UPON THE TRANSFER OF SHARES IN A PHILIPPINE ANONYMOUS PARTNERSHIP PASSING BY THE WILL OF A DECEDENT WHO WAS A RESIDENT OF AND DOMICILED IN A STATE OF THE UNION.**

The language of the statute does not compel this construction and, on the principles hereinafter stated, the Court's construction was unreasonable and improper. The pertinent provisions of the section read as follows:

> "Every transmission by virtue of inheritance, devise, bequest, gift *mortis causa* or advance in anticipation of inheritance, devise, or bequest of real property located in the Philippine Islands and real rights in such property; of any franchise which might be exercised in the Philippine Islands; of any shares, obligations, or bonds issued by any corporation or *sociedad anónima* organized or constituted in the Philippine Islands in accordance with its law; of any shares or rights in any partnership, business or industry established in the Philippine Islands, or of any personal property located in the Philippine Islands shall be subject to the following tax * * *."

It is true that the section refers to "every transmission" but does not elaborate upon this language or specifically state that it relates to non-residents as well as residents. It is to be noted that it applies not alone to shares of a corporation or sociedad anónima (throughout these entire proceedings the shares in an anony-

mous partnership of the Philippines have been assumed, in accordance with the laws of the Philippines, as having the same general status as shares of a corporation), but likewise to "obligations, or bonds" issued by a corporation or partnership. Although there are no such obligations or bonds involved in the instant case, the Court's construction raises the question of validity, not only under the doctrine of *First National Bank of Boston v. Maine* relating to corporate stock, but likewise under *Baldwin v. Missouri* involving money in bank and obligations on notes, under *Beidler v. South Carolina Tax Commission* which concerned bonds of a corporation, and under *Farmers Loan & Trust Co. v. Minnesota* relating to state bonds. The extension of the statute to the shares owned by a nonresident was unnecessary and violated certain generally accepted rules of construction:

(a) That when a statute admits of two interpretations, one of which presents a grave question of constitutionality and the other brings it within constitutional limits or avoids the question thereof, the Court should adopt the latter interpretation.

This Court has said that this rule is elementary. And, of course, it does not mean that the Court's first duty is to decide that the statute is unconstitutional and then to proceed with its construction, but that it is the Court's duty, where possible, to avoid "grave and doubtful constitutional questions".

United States ex rel. The Attorney General v. Delaware and Hudson Co., 213 U. S. 366, at 408, 53 L. ed. 836;

Shwab v. Doyle, 258 U. S. 529, 66 L. ed. 747.

(b) That a taxing statute be not assumed to operate extraterritorially.

Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Backus, 154 U. S. 421, at 428, 38 L. ed. 1031.

As stated by Professor Cooley, in his textbooks on Taxation, 4th Edition, section 100:

> "there is no presumption that a state intends extraterritorial taxation, and, before a tax statute will be condemned as not being limited in its operation to persons or property within the state, it must clearly appear from the language used that the statute was intended to reach sources of revenue which are beyond the state's territorial jurisdiction."

The principle that the subject to be taxed must be within the jurisdiction of the state or territory applies as well in the case of a transfer or succession tax as in that of a property tax.

Rhode Island Hospital Trust Co., Executor, v. Doughton, 270 U. S. 69, 70 L. ed. 475.

(c) That if a statute be subsequently amended, the presumption is that the amendment was intended to change the statute and that the content of the amendment was not contained in the original law.

Admittedly this rule of construction may be affected by the circumstances attendant upon the adoption of the statute. The Courts have, however, repeatedly held that an amendment to the prior act demonstrates the intent to change the pre-existing law;

> "and the presumption is that it (the amendment) intended to change the statute in all particulars

touching which we find a material change in the language of the act." (*Irwin, Collector of Internal Revenue, v. Gavit,* 295 Fed. 84, at 88 [CCA, 2nd]; reversed on other grounds 268 U. S. 160, 69 L. ed. 897.)

U. S. v. Bashaw, 50 Fed. 752 (CCA, 8th) (likewise reversed on other grounds 152 U. S. 436, 38 L. ed. 505);

MacKay v. Commissioner, 94 Fed. (2d) 558, at 561 (CCA, 2nd);

U. S. v. Board of Commissioners, 26 Fed. Supp. 270 at 274 (D. C. N. D. Okla.);

Holmes, Federal Taxes, 6th Edition, page 1589.

The facts of the instant matter clearly bring the case within this rule of construction.

By Commonwealth Act No. 106, adopted several years subsequent to the death of the decedent herein on September 16, 1932 (the Act became effective October 26, 1936), the Philippine Legislature amended section 1536 of the Administrative Code by inserting "whether a resident or nonresident" after the introductory words "Every transmission by a decedent" (Petition, page 5). The insertion of these words, however, evidences the fact that the statute was previously ambiguous, at the very least. If the statute had the broad effect prior to its amendment which the Philippine Supreme Court in this case ascribed to it, the amending words were unnecessary.

Although it is appreciated that this Court is disposed to accept the construction placed by the highest Court of a territory or possession upon a local statute,

it is likewise true that such "disposition may not be yielded to, where the lower court has clearly erred" (*Philippine Sugar etc. Co. v. Philippine Islands,* 247 U. S. 385, 62 L. ed. 1177). See also,

Yu Cong Eng v. Trinidad, 271 U. S. 500, 70 L. ed. 1059.

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2. **THE SUPREME COURT OF THE PHILIPPINES ERRED IN HOLDING THAT THE PHILIPPINE ISLANDS MAY VALIDLY TAX THE TRANSFER UPON DEATH OF SHARES IN AN ANONYMOUS PARTNERSHIP OF THE PHILIPPINES, OWNED BY AND PART OF THE ESTATE OF A DECEDENT RESIDING AND DOMICILED IN A STATE OF THE UNITED STATES.**

(a) The precise question as to the power of the Philippines to tax shares of stock in a Philippine anonymous partnership or corporation, passing by the will of a person domiciled in a State of the United States, has not heretofore been finally determined. We are aware of no case decided by this Court which has determined the question of the right of the Philippine Islands to impose a tax to the extent claimed herein. The case of *First National Bank of Boston v. Maine,* which is closest to the instant matter upon its facts, involved the attempt by the State of Maine to tax the transmission by death of shares of stock in a Maine corporation, passing under the will of a decedent who, at the time of death, was a resident of the State of Massachusetts. In denying to the State of Maine, the right to impose such inheritance or succession tax, the court considered the effect of the Fourteenth Amendment upon the exercise

of the taxing power as between two states. As herein elsewhere noted, it is, of course, contended by petitioner that the same rule should apply, under similar circumstances, as between the Philippine Islands and a State of the United States.

The Courts of the Philippines in the instant matter have placed great emphasis upon *Burnet v. Brooks,* but this case does not determine the issue here involved as it relates to the power of the federal government to impose an estate tax upon the intangible property of a nonresident decedent which was physically present in the United States. This Court in that case first construed the legislative intention of Congress, in the light of the established taxing power of the federal government, as imposing a tax upon such intangibles as it could reach, irrespective of the arbitrary principle of *mobilia sequuntur personam.* The Court then considered the question of power to levy the tax, and concluded that:

> "As a nation, with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." (77 L. ed. 852.)

The existence of jurisdiction was held a sufficient answer to any alleged constitutional restriction. The Court recognized the doctrine of *First National Bank v. Maine* and other cases, but held that the principle thereof "progressively applied in limiting the jurisdiction of the States to tax, does not restrict the taxing power of the Federal Government." (77 L. ed. 855.)

(b) The cases relating to the taxing power as between the several States should, by analogy and authority, control the exercise of such power as between the Philippine Islands and a State of the United States. To assert that the doctrine of *Burnet v. Brooks* applies to the instant matter, rather than the case of *First National Bank of Boston v. Maine,* is to ascribe to the Philippine Islands a greater sovereignty or jurisdiction than to the several States. Even a most casual reference to the organic powers of the Philippines clearly establishes that this is not a correct assertion. The powers of the Philippine government stem from enactments of Congress granting such powers.

Philippine Autonomy Act of Congress, August 29, 1916, Chapter 416; 39 Stat. 546.

The more recent legislation, providing for and relating to ultimate independence of the Philippines, does not, particularly as applied to the instant matter, basically change this situation.

Act of Congress, January 17, 1933, Chapter 11; 47 Stat. 765;

Act of Congress, March 24, 1934, Chapter 84; 48 Stat. 456.

The constitutional limitations of the States upon which the decisions of *First National Bank of Boston v. Maine* and others in accord heretofore cited are based are part of the organic law of the Philippines with equal force and effect, being statutes of the United States, as if the Constitution itself directly applied.

The Philippine Bill of Rights (Act of Congress, August 29, 1916, Chapter 416, section 3; 39 Stat. 545, U.S.C.A. Title 48, section 1008 [Petition, page 5]) incorporates in its first sentence that provision of the Fourteenth Amendment which is the basis of *First National Bank of Boston v. Maine.* This Court has on numerous occasions considered and upheld the due process protection of the Federal Constitution as adopted in the laws of the Philippines.

Ong Chang Wing v. United States, 218 U. S. 272, 54 L. ed. 1040;

Yu Cong Eng v. Trinidad, 271 U. S. 500, 70 L. ed. 1059;

Compania General De Tabacos De Filipinas v. Collector of Internal Revenue, 275 U. S. 87, 72 L. ed. 177.

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3. THE SUPREME COURT OF THE PHILIPPINES ERRED IN HOLDING THAT THE SHARES IN AN ANONYMOUS PARTNERSHIP WHICH BELONGED TO DECEDENT AT THE TIME OF HER DEATH HAD A SITUS IN THE PHILIPPINES SUFFICIENT TO SUSTAIN THE JURISDICTION OF THE PHILIPPINES TO IMPOSE A TAX UPON THE TRANSFER OF SAID SHARES UNDER DECEDENT'S WILL.

In reaching its determination that section 1536 of the Administrative Code was not unconstitutional in its application to the estate of the decedent herein, the Supreme Court of the Philippines laid emphasis upon the fact that decedent's certificates of stock were in the possession, at the time of her death, of the secretary of the corporation, to whom they had been de-

livered and endorsed in blank (Record, page 137). There is, of course, no contention that decedent had divested herself of any ownership or rights of ownership. In fact, the record unequivocally establishes the contrary (Record, page 32). The statement of the Philippine Court that the possessor of the certificates had the right to vote them, to collect the dividends, and even to dispose of them (Record, page 137), is entirely unsupported by anything in the record. The Court admits that such action would be "without prejudice to her liability to the owner for violation of instructions" (Record, page 137).

It is apparently upon the basis of these facts that the Court sought to bring this case within the decision of *Curry v. McCanless.* But the instant situation is not like that which caused this Court to uphold the tax imposed by the State of Alabama; the decedent had created a trust in that State, had transferred intangibles to a trustee to which he had given full power of management and control, had reserved to himself a general power of appointment over the trust property, and had otherwise acted "so as to avail himself of the benefit of the laws of" that State (83 L. ed. 1348).

There is here no necessity of determining the extent of the taxing power of the Philippine Islands as based upon a "business situs" of the shares. Mere presence of the certificates in custody in the Philippines does not establish such situs.

Ewa Plantation Co. v. Wilder, 289 Fed. 664, at 670 (CCA, 9th).

But the Supreme Court of the Philippines does not even require a business situs to sustain the imposition of the tax, stating:

> "In the instant case, the actual situs of the shares of stock is in the Philippines, the corporation being domiciled therein." (Record, page 137.)

The quoted statement goes beyond anything heretofore decided on this subject by this Court.

If the judgment of the Supreme Court of the Philippines is upheld, it must necessarily mean this Court concludes that *Curry v. McCanless* has overruled *First National Bank of Boston v. Maine*. *Curry v. McCanless* itself does not so indicate and, in fact, cites without disapproval the earlier decision.

The facts of this case are practically identical to those of *First National Bank of Boston v. Maine*. If for no other reason therefore, and petitioner believes that other adequate reasons have been advanced herein, than to determine whether that case on its facts is still law, this petition should be granted.

Dated, San Francisco, California,
January 30, 1941.

Respectfully submitted,
SIDNEY M. EHRMAN,
LLOYD W. DINKELSPIEL,
Counsel for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of*_____*1941.*

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Solicitor General Commonwealth of the Philippines,
Counsel for Respondent.